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IN THE

Supreme Court of the United States

October Term, 1969

No. 1013

JAMES C. WINSTON,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	10
APPENDIX A—Opinion Below	A1
APPENDIX B—Judgment of the Court of Appeals	A6
APPENDIX C—Southern District of New York Calendar Rules	A7

TABLE OF AUTHORITIES

Cases:

Davis v. United Fruit Company, 402 F.2d 328	4
Guardian Assurance Company of London v. Quintant, 227 U. S. 100	8
Hintz v. Beto, 379 F. 2d 937 (C. A. 5)	9
Ungar v. Sarafite, 376 U. S. 575	9
Valdes v. Central Altagarcia, Inc., 225 U. S. 58	8

Other Authorities:

Throckmorton, *Mutual Problems of Physicians and Lawyers in the Presentation of Modical Testimony,* 1965 Proceedings, ABA Section of Insurance, Negligence and Compensation Law 363	6
Federal Rules of Civil Procedure, Rule 26(d)	9

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No. .....

JAMES C. WINSTON,

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v.

PRUDENTIAL LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES C. WINSTON, by his attorney, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, entered on September 3, 1969. An order extending time to file Petition for Writ of Certiorari to and including January 2, 1970 was entered November 28, 1969.

Opinion Below

The opinion of the Court of Appeals (App. A, pp. A1 to A5, *infra*, is reported at 415 F.2d 619.

Jurisdiction

The judgment of the Court of Appeals (App. B *infra*, p. A6) was entered on September 3, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

Whether it constitutes a serious abuse of discretion to force an injured seaman to submit his action for damages for personal injuries to the jury without the aid of necessary medical expert testimony because the doctor who was to testify could not be in court on the afternoon the trial began and to refuse to grant even a five-minute continuance to permit counsel to call the doctor to determine if he could come to court immediately.

Statement

Petitioner James C. Winston lost his sense of taste and his sense of smell after having been exposed to hydrochloric acid fumes while serving as an unlicensed Junior Engineer aboard respondent's vessel, the SS. ADELBORO VICTORY. On October 30, 1963, petitioner and his superior, the First Assistant Engineer, Mr. Hazel, has used hydrochloric acid to clean evaporators in the ship's engine room. On the following day petitioner reported to the ship's Chief Officer, complaining about his eyes. When the ship arrived in Norfolk, Virginia, on November 12, 1963, petitioner immediately went to the United States Public Health Service, where he received treatment from November 15, 1963, to June 4,

1964. His condition was diagnosed at the Public Health Service as: "Loss of taste and smell, etiology unknown, possibly secondary to acid exposure."

Alleging that his injuries were sustained as a result of the negligence of respondent and the unseaworthiness of the vessel in that he had not been provided with a proper mask to prevent inhalation of the acid fumes, petitioner instituted this action for damages in the United States District Court for the Southern District of New York in February, 1966. In a pre-trial order entered in February, 1968, each of the parties indicated that it would require one day for the presentation of its case and respondent indicated that it would present testimony from four witnesses. The pre-trial conference was held before Judge Bonsal on Januray 26, 1968. The case appeared on the No. 1 Calendar on October 1, 1968, New York Law Journal, Vol. 160, No. 65, Page 20 in position #90. The final settlement conference was held before Judge Pollack on October 16, 1968, on which date the case was #69 on the Ready Day Calendar. On October 18, 1968, the case appeared in the Ready Day Calendar in position #40, N.Y.L.J., Vol. 160, No. 78, p. 71, col. 7.

On October 23, 1968 the attorneys for the respective parties received a telephone call from the Clerk of the Court that the case could go to trial the following afternoon, and the attorneys were informed to have their witnesses ready. The Clerk again telephoned counsel later in the day and informed them that they would definitely go to trial the following afternoon and that they should then be ready to proceed.

Petitioner's counsel immediately called Dr. Donald Weissman, a medical doctor who had previously examined petitioner and whose testimony was essential to establish the casual relationship between petitioner's loss of taste and smell and the exposure to hydrochloric acid. Dr. Weissman advised counsel that he had patients scheduled for his office from 9:00 a.m. to 7:00 p.m. the following day, Thursday, but that he would be free to come to Court at 1:30 Friday afternoon.

When the case was called for trial at 2:15 p.m. on Thursday, October 24, 1968, petitioner's counsel advised the Court that petitioner's medical expert would be available the following afternoon at 1:30 p.m. He requested that, if the petitioner's other evidence concluded before that time, he be allowed to bring the doctor in for testimony at 1:30 the following afternoon. The trial judge denied the request and the case proceeded to trial.

Because petitioner and his superior, Mr. Hazel, were both at sea at the time of trial, petitioner's counsel read their depositions to the jury. This procedure was necessitated by the rule in effect in the Second Circuit which requires counsel in a seaman's case to proceed on the plaintiff's deposition if the plaintiff is at sea when the case is called for trial. *Davis* v. *United Fruit Company*, 402 F.2d 328. Counsel then read into evidence portions of a pre-trial stipulation and introduced two exhibits without objection. Having produced all of his evidence other than the testimony of the medical expert on causation, petitioner's counsel advised the court:

"Your Honor, at this time the plaintiff has completed his case except for its medical witness, Dr. Don-

ald Weissman, who is available for testimony at 1:30 tomorrow afternoon.

"The Court: He is too late. Have you got any other witnesses?

"Mr. Goldstick: No, your Honor.

"The Court: Do you rest?

"Mr. Goldstick: No. May I have a five-minute adjournment to see if I can get the doctor to come down at this time?

"The Court: We are not waiting for the doctor. You cannot keep all these people waiting.

"Mr. Goldstick: Your Honor—

"The Court: I have ruled on it.

"Do you have any other witnesses?

"Mr. Goldstick: No, I ask for an exception to your ruling.

"The Court: You have an exception all you want. You rest. You are out of witnesses. All right."

Apparently recognizing that petitioner could not possibly prevail without the testimony of his medical expert as to causation, respondent's counsel rested without calling any of the four witnesses he had indicated he would call in his pre-trial memorandum. In summation, respondent's counsel pointed out to the jury that:

> "There has been no testimony whatsoever to tie in or give you any reason, any causation, for his having lost his sense of taste and smell."

After only forty minutes of deliberation, the jury returned with a verdict for respondent.

Reasons for Granting the Writ

In this case, petitioner has been deprived of a valid cause of action because his medical expert witness could not abandon the patients he had scheduled for office visits in order to appear in Court on less than twenty-four hour's notice. This case, thus, presents an important question whether the Courts should make some reasonable effort to accommodate their busy schedules to the equally busy and important schedules of practicing physicians.

While medical testimony is a vital element in almost all personal injury cases, it is becoming increasingly difficult to persuade busy practitioners to serve as expert witnesses. See generally, Throckmorton, *Mutual Problems of Physicans and Lawyers in the Presentation of Medical Testimony,* 1965 Proceedings, ABA Section on Insurance, Negligence and Compensation Law 363. If the Procrustean rule adopted in this case, which grants no leeway to litigants in presenting the testimony of medical experts, is allowed to stand, it will be virtually impossible to get practicing physicians to testify in personal injury litigation in the Federal Courts. No practicing physican can be expected to agree to abandon his patients on a moment's notice in order to appear as an expert witness.

In order to appreciate fully the magnitude of the problem involved in this case, it is necessary to consider the world of uncertainty in which a trial attorney is forced to operate. Until the moment that his case is actually called for trial a trial attorney does not know with certainty when he will need to have his medical witness available. The

calendar history of the instant case provides a good example of this uncertainty. When on October 1, 1968 this case appeared on pre-trial calendar in the Law Journal it was in position No. 90. At this point counsel could only make an educated guess that the case might be tried near the end of the month. When on October 18, 1969, the case appeared as No. 40 on the trial calendar, counsel was still unable to fix with certainty the day on which the trial would begin and even when counsel received a call from the Clerk on October 22nd indicating that the case would probably begin the following day, counsel could not be certain that the case would in fact proceed to trial the following day. Moreover, counsel's ability to predict the time when the doctor's testimony would be necessary was further complicated by the uncertainties concerning the amount of time that would be required to select a jury and for the opening statements of trial counsel.

In light of this factual situation, it was clearly impossible for counsel to have subpoenaed the doctor to be in Court on the precise date when his testimony would be needed. The only way counsel could have been assured of the doctor's presence in Court when needed would have been by subpoenaing the doctor to appear in Court several days before the date that the trial might reasonably have been expected to commence and thereafter adjourning the subpoena from day to day until the acutal date of trial. Such a procedure would not only have unreasonably interfered with the doctor's practice but would unquestionably have prejudiced the doctor against petitioner and his attorney.

Yet, the facts of this case show that it would have been quite easy for the Court to have made a reasonable adjustment of its schedule to accommodate the busy private practitioner who had agreed to testify on petitioner's behalf, without wasting judicial time or unreasonably delaying the trial of this case.

Each of the parties indicated in the pre-trial order that the presentation of its case would take a full day. Thus, when at 4 o'clock in the afternoon petitioner's counsel announced that he had presented all of his evidence, except for the doctor who would be available at 1:30 p.m. the following afternoon, the court could have directed respondent to proceed with its case pending the arrival of petitioner's doctor.

While the question whether or not a continuance should be granted is one which rests in the discretion of the district court, this Court has recognized "That where it is manifest that there has been a plain abuse of discretion, the duty to correct arises." *Guardian Assurance Company of London* v. *Quintana,* 227 U.S. 100, 103-104; see also *Valdes* v. *Central Allagarcia, Inc.,* 225 U. S. 58, 73; Petitioner submits that in the circumstances of this case the action of the district judge in refusing even a five-minute continuance to allow plaintiff's counsel the opportunity to produce his medical expert constituted a clear abuse of discretion, which should be corrected by this court.

The suggestions of the court below that counsel could have avoided the problems of scheduling the doctor's testimony by taking his deposition before trial or by an application for an adjournment in the Calendar Part are un-

realistic.* In the first place, it seems unreasonable to place a burden on an injured seaman to bear the expense of a deposition of a medical expert witness when that doctor will be available at the time of trial. Moreover, since counsel knew that the doctor would be in New York City at the time of trial, there appeared no basis for the introduction of his deposition by the plaintiff under Rule 26(d) of the Federal Rules of Civil Procedure—the doctor was not unable to appear to testify, there was simply a problem of scheduling his testimony so that he would not have to abandon his patients. Similarly, the problem could not be solved by an application for an adjournment in Part I because counsel could not know until the case was assigned to a trial judge who fixed a definite time for the commencement of the trial, whether the doctor would be available at that time or whether some effort would have to be made to accommodate the doctor's schedule. Indeed, had counsel made such an application in Part I he would no doubt have been told that the question of scheduling the doctor's testimony should be taken up with the Judge to whom the case is assigned for trial.

The concern of the Courts for the expeditious disposition of cases is understandable in light of the present congestion of Court calendars. Yet, this Court has recognized in criminal cases that, "a myopic insistance upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar* v. *Sarafite,* 376 U. S. 575, 589. See also *Hintz* v. *Beto,* 379 F. 2d 937 (C. A. 5). Similarly, in Civil

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* The relevant Calendar Rules of the United States District Court for the Southern District of New York are set forth as Appendix C, *infra.*

cases, the attempt to handle cases expeditiously should not be allowed to result in denying litigants the right to have their cases adequately presented to the jury. Here, petitioner was denied a meaningful day in Court because he was forced to submit his case to the jury without benefit of vital expert testimony, and was denied even a five minute recess to enable him to get the doctor to come to Court immediately. To say that such a result is justified in order to prevent congestion is to exalt the process of justice over the ends of justice.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 581—September Term, 1968.

(Argued May 14, 1969 Decided September 3, 1969.)

Docket No. 33013

JAMES C. WINSTON,

Plaintiff-Appellant,

—v.—

PRUDENTIAL LINES, INC.,

Defendant-Appellee.

Before:

WATERMAN, SMITH and KAUFMAN, Circuit Judges.

Appellant, claiming gross abuse of discretion in denying him continuances he sought during a jury trial, appeals a judgment dismissing his complaint entered upon the jury verdict and order denying a motion for a new trial, United States District Court for the Southern District of New York, MacMahon, *J.* Judgment affirmed.

DAVID GOLDSTICK, Somers & Goldstick, New York City, *for Plaintiff-Appellant.*

JOHN J. PURCELL, Lilly, Sullivan & Purcell, New York City, *for Defendant-Appellee.*

PER CURIAM:

Plaintiff commenced this action against the defendant shipowner seeking to recover damages for personal injuries he claimed were caused when he was employed as an unlicensed Junior Engineer on defendant's vessel. This alleged injury was a permanent loss of taste and smell. The plaintiff's claim was that an exposure to hydrochloric acid fumes under circumstances demonstrating the shipowner's negligence was the cause of the injury.[1] The only person competent to testify for plaintiff with reasonable medical certainty that the injury resulted from the exposure was the plaintiff's medical witness.

The case had been on the Ready Day Calendar of the Southern District of New York since October 16, 1968, and on October 23 the attorneys for the parties received final telephone notice that trial would commence on the following day. Although plaintiff was not in New York and could not appear in person, plaintiff's counsel made no motion to take the case off the trial calendar and stated he was prepared to start at 1:30 P.M. on October 24 by reading plaintiff's deposition into evidence. Before doing so, although at the same time insisting that he was ready to go to trial, he requested that he be permitted to put his doctor on the stand at 1:30 the following afternoon and, if all other evidence were closed before that hour, that he be granted a continuance until then for that purpose. The

1. The Public Health Service records were introduced into evidence solely for the purpose of the diagnosis of "Loss of taste and smell, etiology unknown; possibly secondary to acid exposure." The ship's medical record was also in evidence. The exposure occurred on October 30, 1963. Injury was reported October 31. When the ship docked on November 12 appellant immediately went to the U. S. Public Health Service and received P.H.S. treatment as an outpatient from November 15, 1963 to June 4, 1964.

application was denied by the trial judge, Judge MacMahon, a jury was impaneled and sworn, and the trial began. Except for the doctor's testimony plaintiff's case was concluded by 4 P.M. and counsel again moved for a continuance until 1:30 P.M. of the following day. The request was refused. Counsel then requested a five-minute adjournment for the purpose of telephoning the doctor. This request was refused and the plaintiff was required to rest his case. The defendant forthwith rested without putting in any evidence, the case was immediately submitted to the jury, and before 6 P.M. the jury returned a verdict dismissing plaintiff's complaint. Claiming that the denial of the continuance motions grossly prejudiced his case plaintiff's counsel moved to set aside the verdict and for an order directing a new trial. Judge MacMahon denied this post-verdict motion and he entered judgment on the jury verdict.

Appellant concedes that a federal trial judge has broad discretion in granting or denying a request for short continuances during the course of a trial. *Peckham* v. *Family Loan Co.*, 262 F. 2d 422 (5 Cir. 1959). Appellant argues, however, that there was an abuse of discretion in this case, and it most assuredly appears that his argument is far from a frivolous one. Nevertheless, we are acutely aware of the serious calendar problem which exists in the Southern District of New York and we recognize that Judge MacMahon is one of the district's most zealous judges in moving that calendar. See, *e.g.*, *Vitarelle* v. *The Long Island Rail Road Co.* (2 Cir. July 22, 1969).

We have stated that:

> "* * * We will not interfere with the conscientious Judge who will not accept the status quo of calendar

> congestion. The task of updating calendars is arduous, complicated and burdensome. Since the trial judge must be entrusted with the power to alleviate calendar congestion, we shall not put obstacles in his way when he exercises his judgment *wisely* in achieving the desired goal." (Emphasis added.) *Davis* v. *United Fruit Co.*, 402 F. 2d 328, 331-332 (2 Cir. 1968).

Thus we have permitted a great deal of latitude to be given to individual district judges who conscientiously labor to reduce calendar congestion, but we have hoped that in the utilization of this discretionary latitude the judges should also bear in mind that tight docket control, although a vital part of efficient judicial administration, is not an end in itself. The purpose behind close docket control is that of assuring that justice for all litigants be neither delayed nor impaired. As we clearly stated in *Davis, supra,* "a court must not let its zeal for a tidy calendar overcome its duty to do justice." *Id.* at 331. In the present case, had any one of us been the trial judge, each of us might well have made somewhat different dispositions of plaintiff's two motions for half-day continuances (or, in any event, the five-minute request) than the dispositions Judge MacMahon chose to make; but as reviewing judges we are unwilling to hold that Judge MacMahon's decisions were so unreasonable as to be abuses of a trial judge's discretion. We rule thus the more readily for we point out that plaintiff's counsel had two obvious ways open to him by which he could have protected his case. First, realizing that his medical witness might not be available at all times, counsel could have taken the doctor's deposition. Indeed, his client's deposition was taken and he was no doubt aware of the consequences to his case if that deposition were not available. *Davis* v. *United Fruit Co., supra.*

Second, if counsel knew that his witness might not be available on the day set for trial he could have moved for relief prior to trial under Calendar Rule 7(b)(1) of the Southern District of New York rather than insisting that he was ready. The Rule provides in part that:

> When a case is advanced to the Ready Day Calendar, if there are any reasons why it may not proceed to trial on 24 hours telephonic notice, counsel shall make immediate application to the Part 1 Judge for an adjournment of the case on the calendar. * * * Such applications must be made in the event that by reason of engagement or illness of counsel, *unavailability* or illness *of witnesses,* or for any other reason, the case cannot proceed to trial on 24 hours telephonic notice. The Part 1 Judge will then make whatever disposition is necessary in the interests of justice. * * * (Emphasis added.)

Counsel having failed to adopt either of these possible avenues of relief as a hedge against the likelihood that his witness might not be available when needed, we affirm the judgment below and hold that plaintiff must bear the unfortunate consequences of having the merits of his case submitted for jury resolution without the benefit of the testimony of his medical witness.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of September one thousand nine hundred and sixty-nine.

Present:

HON. STERRY R. WATERMAN,
Hon. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN, Circuit Judges.

JAMES C. WINSTON,
Plaintiff-Appellant,

v.

PRUDENTIAL LINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. Daniel Fusaro
Clerk

APPENDIX C

S.D.N.Y. CAL. RULE 5(a):

> A party desiring to place a cause upon the trial calendar may file with the clerk, with proof of service thereof upon the attorneys of all parties who have appeared, a note of issue signed by an attorney of record stating: * * *
>
> (8) That the parties have taken, or have had reasonable opportunity to take and complete necessary depositions and other discovery proceedings; * * *
>
> (10) That the cause is in all respects ready for trial; * * *

S.D.N.Y. CAL. RULE 7(b)(1):

> When a case is advanced to the Ready Day Calendar, if there are any reasons why it may not proceed to trial on 24 hours telephonic notice, counsel shall make immediate application to the Part 1 Judge for an adjournment of the case on the calendar. The application shall be in writing; it shall be filed with the clerk for calendars; served upon the other parties, and shall be returnable before the Part 1 Judge and shall be heard by him promptly. Such applications must be made in the event that by reason of engagement or illness of counsel, unavailability or illness of witnesses, or for any other reason, the case cannot proceed to trial on 24 hours telephonic notice. The Part 1 Judge will then make

whatever disposition is necessary in the interests of justice.

Attorneys who fail to apply to the Part 1 Judge as provided above and who are unable to proceed to trial when assigned shall be subject to sanctions as provided in Rule 16.

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OCTOBER TERM, 1969

No. [redacted] 1013

JAMES C. WINSTON,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

BRIEF OF RESPONDENT, PRUDENTIAL LINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Statement	1
Question Presented	1
Reasons for Denial of Writ	2
Conclusion	5

Table of Case Cited

Davis v. United Fruit Company, 402 F.2d 328	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 33,013

JAMES C. WINSTON,

Petitioner,

v.

PRUDENTIAL LINES, INC.,

Respondent.

BRIEF OF RESPONDENT, PRUDENTIAL LINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Statement

That respondent-shipowner was sued by the petitioner to recover damages for personal injuries which he allegedly sustained while employed as an Unlicensed Junior Engineer on defendant's vessel, the *SS Attleboro Victory,* in October 1963. The trial commenced on October 24, 1968 and concluded the same day. The jury returned a verdict for the defendant and a judgment was entered on October 25, 1968 dismissing the plaintiff's complaint.

Question Presented

Whether the trial judge abused his discretion in refusing to grant petitioner a continuance to adduce medical

testimony in an action which had been listed on the ready day calendar for approximately one week and in which a Statement of Readiness was filed by the petitioner on January 6, 1967.

Reasons for Denial of Writ

Respondent believes that a chronology of the movement of this case from January 6, 1967, when petitioner filed his Note of Issue and Statement of Readiness until October 24, 1968, when the case was tried, will substantiate the contention of respondent that the trial judge did not abuse his discretion in denying petitioner's motion for a continuance. The pre-trial conference was held before Judge Bonsal on January 26, 1968. The case appeared on the No. 1 Calendar on October 1, 1968, New York Law Journal vol. 160, No. 65, p. 20 in position #90. The final settlement conference was held before Judge Pollack on October 16, 1968, on which date the case was #69 on the Ready Day Calendar. On October 18, 1968, the case appeared in the Ready Day Calendar in position #40, N.Y.L.J. vol. 160, No. 78, p. 71, col. 7. On October 23, 1968, the attorneys for the respective parties received final notice by telephone that the trial would commence on October 24, 1968. The trial commenced on October 24, 1968 and concluded the same day. The jury returned a verdict for the defendant and a judgment was entered on October 25, 1968, dismissing the plaintiff's complaint.

The foregoing chronology of the movement of the case clearly indicates that the parties had ample opportunity to prepare for trial. Prior to the commencement of the trial it developed that respondent's medical expert had retired from practice and resided in California. Respondent accordingly engaged another medical expert and served an amended pre-trial memorandum on plaintiff's counsel identifying the new medical expert. The same course of action was available to petitioner.

As stated by the United States Court of Appeals, Second Circuit, in a Per Curiam decision affirming the action of the trial court in this case, there were two obvious options open to petitioner by which he could have protected his case 415 F.2nd 619 (1969). First, he could have taken the doctor's deposition as a protective measure and could still have produced the medical expert to give testimony in the event the doctor was available to testify. Second, if petitioner knew his witness might not be available he could have moved for relief prior to trial under Calendar Rule 7 (b)(1) of the Rules of the United States District Court, Southern District of New York, which rule provides in part:

> "When a case is advanced to the Ready Day Calendar, if there are any reasons why it may not proceed to trial on 24 hours telephonic notice, counsel shall make immediate application to the Part 1 Judge for an adjournment of the case on the calendar. * * * Such applications must be made in the event that by reason of engagement or illness of counsel, unavailability or illness of witnesses, or for any other reason, the case cannot proceed to trial on 24 hours telephonic notice. The Part 1 Judge will then make whatever disposition is necessary in the interests of justice. * * *"

Respondent was under the same obligation as petitioner to be ready to proceed to trial after having ample opportunity to prepare its defense. It is respectfully submitted that the decision in *Davis* v. *United Fruit Company,* 402 F.2d 328, (2 Cir. 1968), cert. denied February 24, 1969, 89 S.Ct. 869, is dispositive of petitioner's writ. There is a factual similarity between the two cases, the difference being that in the *Davis* case the plaintiff was not available to testify, whereas in this case the plaintiff's medical expert was not available. The contention of petitioner that it was an abuse of the discretion on the part of the trial judge to grant a five minute continuance to permit counsel to call a medical expert to determine whether he could come to

Court immediately, is without merit. Even if the request for a continuance had been granted, it is obvious that the medical expert could not have reached the Court to testify on October 24, 1968. Therefore, the real question is did Judge MacMahon abuse his discretion in refusing to grant a continuance until the afternoon of the following day. Respondent submits that Judge MacMahon did not abuse his discretion. It should be noted that unlike numerous cases which have been dismissed for lack of prosecution, petitioner in this case had his day in Court and the fact that one of his witnesses, whose office is in New York, did not testify, does not warrant interfering with the actions of a conscientious judge who, in respondent's opinion, acted properly.

The language of Judge Kaufman in the *Davis* case, *supra,* is in all respects and for the same reasons, applicable to this case. Judge Kaufman stated, at page 330:

> "The authority to decide whether a continuance should be granted is entrusted to the sound discretion of the trial judge. Before we will upset his ruling, it must be established that he acted arbitrarily. United States v. Ellenbogen, 365 F.2d 982 (2nCir. 1966)."

In concluding his opinion, Judge Kaufman stated, at page 331:

> "We realize that a court must not let its zeal for a tidy calendar overcome its duty to do justice. Nor do we suggest that it is always proper to proceed on the basis of a deposition in the absence of a party. Nonetheless, the fact remains that the calendars of the Southern District Court are clogged and justice is being delayed or perhaps impaired as a result. In order to reduce this choking congestion, the district courts must be permitted to exercise their discretion in appropriate ways that will ensure justice to all who seek it. We will not interfere with the conscientious judge who will not accept the status quo of calendar congestion. The task of updating calen-

dars is arduous, complicated and burdensome. Since the trial judge must be entrusted with the power to alleviate calendar congestion, we shall not put obstacles in his way when he exercises his judgment wisely in achieving the desired goal."

Conclusion

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. LILLY
Attorney for Respondent

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

In its brief in opposition to the petition for certiorari, respondent argues that petitioner should not be heard to complain of the actions of the trial court because "petitioner in this case had his day in Court." (Brief in Opposition, p. 4). Respondent's argument fails to recognize, however, that the right to "a day in Court" is rendered meaningless when a party is deprived of the right to produce witnesses whose testimony is necessary to a fair disposition of the case. Petitioner has asked this Court to grant certiorari

because the actions of the District Judge, which were sustained by the Court of Appeals, effectively denied him a meaningful day in court.

Moreover, the instant case does not represent an isolated instance in which the Court of Appeals has failed to protect a litigant's right to a meaningful day in court. Since the petition in this case was filed, the Court of Appeals has again sustained the District Court's denial of a litigant's request for a brief continuance so that necessary medical testimony could be obtained. *Napolitano* v. *Compania Sud Americana De Vapores*, 2d Cir., Docket No. 33960, decided January 26, 1970 (Appendix A, *infra*). In *Napolitano*, testimony began at 10:30 a.m. and all available witnesses had concluded their testimony by 12:20 p.m. At that time defense counsel advised the court that the defense medical witness would not be available until 2:00 o'clock that afternoon, but the trial judge refused to grant even this brief continuance and required defense counsel to sum up immediately. Although the judges of the Court of Appeals stated that they would have granted the continuance requested had they presided at the trial, they refused to hold that the District Court's action constituted an abuse of discretion.

Thus, the Court of Appeals has refused to take any action to protect the right of litigants to a meaningful day in court or to attempt to develop some reasonable accommodation of court schedules to the schedules of physicians who are asked to take time out from their busy practices to testify as expert witnesses in personal injury litigation.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 325 and 326—September Term, 1969

(Argued December 3, 1969 Decided January 26, 1970)

Docket Nos. 33960 and 33961

Felice Napolitano,

Plaintiff-Appellee,

v.

Compania Sud Americana De Vapores, also known as Chilean Line,

Defendant-Appellant.

Felice Napolitano,

Plaintiff-Appellee,

v.

Compania Sud Americana De Vapores, also known as Chilean Line,

Defendant-Appellant.

Before:

WATERMAN, HAYS AND FEINBERG, *Circuit Judges.*

In both of these cases, tried to a jury one week apart, United States District Court for the Southern District of New York, MacMahon, *J.*, plaintiff-appellee recovered verdicts and defendant-appellant shipowner appeals. Plaintiff-appellee, a longshoreman, claimed the unseaworthiness of each of the vessels involved and negligence on the part of defendant-appellant. Appellant claims that several

errors were committed below in each case and relies particularly upon certain alleged abuses of discretion by the trial judge. Judgments entered on the respective verdicts affirmed.

Martin Lassoff, Zimmerman & Zimmermán, New York City, *for Appellee.*

George S. Evans, John L. Quinlan, Bigham, Englar, Jones & Houston, New York City, *for Appellant.*

WATERMAN, *Circuit Judge*:

Plaintiff-appellee, a longshoreman, commenced two actions against the defendant shipowner seeking to recover damages for personal injuries received on two separate occasions while working aboard defendant's vessels. After jury trials held one week apart judgments were rendered in plaintiff's favor in both cases by the United States District Court for the Southern District of New York.

In the first case, Docket Number 33960 (hereinafter case one), plaintiff alleged that in 1963 he slipped on a newspaper which he claimed covered spilled oil or grease, and fell to the deck while loading cargo aboard the defendant's ship, *SS Copiapo*, and that an injury to his left shoulder resulted. Suit was commenced March 30, 1965, but trial was not until June 17, 1969.

In the second case, Docket Number 33961 (hereinafter case two), plaintiff slipped from a Jacob's ladder (a rope ladder with wooden rungs), which was rigged to enable plaintiff and others to disembark from defendant's vessel *SS Maipo* to a lighter (a large boat used to load and unload

ships and to transport freight about a harbor) lying alongside. The cause of plaintiff's fall to the deck of the lighter, and the subsequent injury to his right shoulder, was allegedly the presence of oil or grease on a rung located about six rungs from the bottom of the ladder. This accident occurred in early 1965; suit was commenced on June 28, 1965; and the trial was held on June 24, 1969.

Defendant-appellant raises similar issues in both appeals, and we treat both cases in this opinion. The defendant claims (1) the injuries sustained by the plaintiff were the result of his own negligence in both accidents; (2) the evidence as to the existence of grease or oil under the newspapers in case one, and on the ladder rung in case two, was insufficient to establish either negligence or unseaworthiness; (3) the juries' assessments of damages in both cases were excessive; (4) the trial judge abused his discretion by denying the defendant's request for a recess to await the arrival in court of a medical witness in case one, and abused it in case two by refusing to allow defendant to produce witnesses not named in its pre-trial memorandum; and (5) the court's intemperate remarks in both cases prevented defendant from receiving fair trials. Somewhat reluctantly we do not regard any of these contentions, viewed singly or in combination, sufficient to warrant a reversal and new trial in either case, and therefore affirm the judgments.

I.

The defendant argues that the plaintiff should be denied any relief because the plaintiff in case one was aware that several newspapers were strewn about the deck where he

was working and he did not exercise reasonable care for his own safety by failing to discover that the papers were covering spilled oil or grease, if in fact there were any to cover. The same contention, that plaintiff failed to exercise reasonable care, is advanced in case two, the claim there being that the plaintiff was careless in not determining the surface conditions of each rung as he descended the Jacob's ladder. Putting to one side the issue as to whether credible evidence that these were the operative facts in the cases would constitute contributory negligence as a matter of law, it has long been settled that the contributory negligence of a plaintiff-longshoreman does not bar relief if the shipowner is negligent but is only to be considered in mitigation of plaintiff's recoverable damages. *Palermo* v. *Luckenbach S.S. Co.*, 355 U.S. 20 (1958); *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 408-409 (1953); *The Max Morris*, 137 U.S. 1 (1890). The district court correctly instructed the jury as to the applicable law. No objection was made to the charge as given, and we perceive no grounds for one.

II.

Defendant's next contention, that in neither case was there sufficient evidence of the presence of oil or grease to hold the defendant liable, is meritless. Several witnesses in each case offered testimony to support plaintiff's claims that oil or grease was found on the underside of the newspaper and on the rung of the ladder. The weight to be given their testimony and the appraisal of any inconsistencies in their accounts of the occurrences were matters to be resolved by the jurors.

III.

Plaintiff, who is left-handed, received a contusion and sprain of his left shoulder as a result of the first accident (case one). He was out of work for six or seven weeks. After the date of this injury in 1963, the plaintiff, especially during weather changes and in the morning after waking, had experienced intermittent pain and discomfort. At the time of trial plaintiff had a life expectancy of approximately ten years, and medical testimony revealed that the plaintiff had lost about ten per cent of the functional use of his left arm. The jury awarded $15,000 in damages. The defendant claims that this amount was excessive.

The jury's award represents well under three dollars a day for pain and suffering and loss of mobility, an amount we do not consider to be unreasonable. Cf. *Tarabocchia* v. *Zim Israel Navigation Co., Ltd.*, 417 F.2d 476 (2 Cir. 1969).

Defendant's claim that the damages awarded the plaintiff for his second accident (case two) were excessive is similarly without merit. Plaintiff there suffered contusions and sprains of his right shoulder and lower back in addition to contusions and abrasions of his right elbow. Further, by this accident, plaintiff lost fifteen per cent of the functional use of his right arm, and he has undergone intermittent pain and stiffness since the injury. For this the jury awarded the plaintiff $7,500, an award that does not shock our conscience.

IV.

The testimony of witnesses in case one started about 10:30 A.M. and concluded at 12:20 P.M. At that point defense counsel informed the court that a defense medical witness would not be available to testify until two o'clock that afternoon. Judge MacMahon refused to delay the proceedings to accommodate the defense witness and ordered counsel to sum up.[1] The case was shortly thereafter submitted to the jury. Defendant claims that the trial judge abused his discretion by failing to recess until 2:00 P.M. It does not seem to us that a request to interrupt a trial for a period of approximately one and a half hours, the request coming at a time when courts normally recess for lunch, is unreasonable. Had any one of us been in a position to exercise the discretion committed to a trial judge when such a request is made, we have no hesitancy in stating that the decision would have been otherwise; but as appellate judges we cannot find that the action of the district judge was so unreasonable or so arbitrary as to amount to a prejudicial abuse of the discretion necessary to repose in trial judges during the conduct of a trial. Judge MacMahon's zeal in bringing to conclusion trials in which he has been the trial judge has prompted disappointed litigants to appeal on the ground that his rulings have been abuses of discretion; but, as we said in *Winston* v. *Prudential Lines, Inc.* (2 Cir. Sept. 3, 1969), "We have

1.—Though no mention of this fact was made by the judge at the time of his ruling, our study of the record discloses that the doctor had not been listed in any pre-trial list of defense witnesses. A similar failure to give timely notice of the intent to use named defense witnesses was, however, involved in the exercise of the trial court's discretion in case two. See our discussion thereof, *infra*, in this opinion.

permitted a great deal of latitude to be given to individual district judges who conscientiously labor to reduce calendar congestion." For other cases see *Davis* v. *United Fruit Co.*, 402 F.2d 328, 332 (2 Cir. 1968), *cert. denied*, 394 U.S. 945 (1969), and also *Vitarelle* v. *The Long Island R. R. Co.*, 415 F.2d 302 (2 Cir. 1969). We have also pointed out that litigants have alternative methods of protecting themselves if there is a possibility that a witness may not be available to testify when needed. First, counsel may take a deposition of such a witness and have it ready to introduce if his appearance at trial is in fact delayed. Second, while of little practical help in this case, application may be made to the Part I Judge under Calendar Rule 7(b)(1) of the Southern District of New York if a witness is not to be available on the day of trial, *Winston* v. *Prudential Lines, Inc., supra* at . While we hold that in the two cases presently before us Judge MacMahon did not overstep the bounds of his discretion, we quite frankly state that the court in case one did come dangerously close to causing "its zeal for a tidy calendar [to] overcome its duty to do justice." *Davis* v. *United Fruit Co., supra* at 331, for it appears obvious that "very little by way of expeditious disposition of cases was gained by the judge's ruling." *Vitarelle* v. *The Long Island R.R. Co., supra at* 304. Moreover, we do not think it amiss to indicate that if these recurrent occurrences which to date we have been constrained to view as not being abuses of discretion continue to recur we may find it necessary to consider such a pattern of conduct as detrimental to the administration of justice despite a trial judge's conscientious belief that he is facilitating it.

In case two, defense counsel also was deprived of defense testimony when witnesses present in court but who had not been named in defendant's pre-trial memorandum were not permitted to testify. On the Friday before trial was to commence on Tuesday, defense counsel served on the plaintiff an amended pre-trial memorandum in which he named witnesses not previously mentioned in his original pre-trial memorandum. This memorandum was filed with the court on Monday. Prior to the start of defendant's case, plaintiff's counsel brought this to the court's attention. Judge MacMahon, noting that the action had been pending since 1965, declined to allow defendant's witnesses so named on June 20, 1969 to take the stand on June 24. Accordingly, unable to use the witnesses, the defense rested its case and counsel summed up. After the jury had been charged and had retired, defense counsel was given an opportunity to protect his position in opposition to the court's ruling. In the colloquy that ensued the court recited the protracted history of pretrial hearings, pointing out that the first pre-trial conference was set for February 21, 1968; that conferences were had on February 26 and 27; that the pre-trial order was entered March 31, 1969; and that more hearings were held on April 24 and 30, 1969. In light of this history, Judge MacMahon was unmoved by counsel's efforts to have the adverse ruling reconsidered.

Rule 16 of the Federal Rules of Civil Procedure states in part that when a pre-trial order is entered it "* * * controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." Paragraph

5 of the pre-trial order controlling the "subsequent course" of case two reads:

> The parties agree that the witness whom each party now intends to call, along with the specialty of experts to be called, are those listed in the memorandum heretofore filed pursuant to local Calendar Rule 13(b) III (h). Should any party hereafter decide to call any additional witnesses, *prompt* notice of their identity shall be given to each other party and to the Court by serving and filing a supplemental pre-trial memorandum * * * [The supplemental pre-trial memorandum] shall set forth the reason why the witness was not theretofore identified. No witness may be called at trial unless identified in a pre-trial memorandum. (Emphasis is original).

Defendant's amended pre-trial memorandum listed seven witnesses and stated as the reason for their belated identification that "their availability in this case was not previously known." Counsel was unable to expand upon the above reason at trial. Surely a diligent investigation which should have been conducted long before the eve of trial would have disclosed some, if not all, of the witnesses in question. Counsel's vague and incomplete "reason" is patently transparent.

As was observed by Judge Medina in *Clark* v. *Pennsylvania R.R. Co.*, 328 F. 2d 591, 594 (2 Cir.), *cert. denied*, 377 U.S. 1005 (1964).

> The development of pre-trial procedure and the formulation of Rule 16 of the Federal Rules of Civil Procedure, and similar provisions in most if not all of the States, represents one of the great Twentieth Century contributions to the improvement of judicial adminis-

> tration and the furtherance of effective, timely justice. One of the prime objectives of this new, but now firmly established procedural device, is to do away with the old sporting theory of justice and substitute a more enlightened policy of putting the cards on the table, so to speak, and keeping surprise tactics down to a minimum. With this in mind many courts throughout the country have required some specification by the parties of the identity of the witnesses to be called.
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> * * *
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> [I]t is a fundamental principle of pre-trial that this procedure be flexible, with power reserved to the trial judge to amend the order or permit a departure from strict adherence to the pre-trial statements of either party, when the interests of justice make such a course desirable. Otherwise a pre-trial order or pre-trial statements would hold the parties in a vise, and the result might be just about as bad as a return to the old sporting theory of justice.

While the pre-trial order is not a "strait jacket" binding the parties and court to an unwavering course at trial, there is a reasonable basis for Judge MacMahon's decision. Defense counsel listed only one witness, a medical doctor, in his pre-trial memorandum, being content to refer to other potential witnesses in general terms as e.g. "Officers and/or employees of the defendant who will be identified prior to the trial." Defendant's practice, in a case which had been pending for four years, of waiting until four days prior to the trial date to identify its witnesses by name clearly violates both the letter and the spirit of the rule. The defendant's failure to give "prompt" notice, therefore, precludes a finding of abuse of discretion on the part of Judge MacMahon. *Adickes* v. *S.H. Kress and Co.*, 409 F. 2d 121, 124 (2 Cir. 1968), *cert. granted,* 394 U.S. 1011 (1969).

Finally, appellant claims that it was deprived of an impartial trial in each case because Judge MacMahon at times exhibited impatience and displeasure with defense counsel's handling of the defense. A reading of the records in these cases does tend to evoke sympathy for counsel. His back-to-back courtroom experiences before Judge MacMahon would tend to discourage even a tough-skinned attorney's enthusiasm for trial work. While a good many of the court's unkind remarks indicate a harsh overreaction to counsel's performance, the more vitriolic of Judge MacMahon's displays of displeasure occurred out of the jury's presence. We are not prepared to hold upon a review of the records in these cases that what occurred before the jury so belittled counsel or so disparaged the defense as to deprive the defendant of fair trials. See *Keohane* v. *The New York Central R. R. Co.*, (2 Cir. Nov. 10, 1969); *United States* v. *Bernstein*, (2 Cir. Nov. 3, 1969). However, our affirmance should not be construed as approving the trial judge's unnecessary sarcastic comments or his tongue lashing of defense counsel.

The judgments are affirmed.